

EXHIBIT A

1 January 1, 2010 if not earlier. That is paragraph 37 in
2 docket number 2.

3 Based on this statement and the plaintiff's
4 briefing, at least as I understand it, the plaintiff
5 acknowledges that her claims fall outside of the statute of
6 limitations period. I think Mr. Colvin said that again
7 today, but the plaintiff, nevertheless, asserts that the
8 claims are timely under equitable tolling, the doctrine of
9 equitable tolling, because the defendants fraudulently
10 concealed the conduct that gives rise to the cause of
11 action.

12 We know that the equitable tolling doctrine is
13 read into every federal statute of limitations, and the
14 plaintiff recites this in her papers and correctly so, and I
15 will cite the same case she did. It was discussed in this
16 district in 1984 in the Dahl versus Gardner case, but that
17 is the state of the law and I think continues to be.

18 To toll the statute of limitations based on
19 fraudulent concealment, a plaintiff is required to show
20 three things. Number one, that the defendants used
21 fraudulent means to conceal their violations. Number two,
22 that they were successful in concealing their violations
23 from the plaintiff. Number three, that the plaintiff did
24 not know or could not have known by due diligence of the
25 cause of action. I'm citing here the in re Commercial

1 Explosives Litigation in this district in 1996, which in
2 turn was citing the Tenth Circuit case of King & King
3 Enterprises from 1981.

4 The first prong, the fraudulent means of
5 concealment, is required to be pled with particularity under
6 Rule 9(b). So said the Tenth Circuit in Ballen versus
7 Prudential Bache. I am not sure what that is. That is
8 shorthand. It is the Ballen case from the Tenth Circuit in
9 1994. It is 23 F3rd, 335.

10 Thus, the complaint must set forth the time, place
11 and contents of the false representations, the identity of
12 the party making the false statements and the consequences
13 thereof. I am citing a District Court decision from this
14 circuit, in re Urethane Antitrust Litigation from the
15 District of Kansas in 2009. That is not a perfect fit,
16 because concealment might also include omissions, but even
17 then, under Rule 9(b) there has to be specificity about what
18 it is that was omitted or concealed or not disclosed,
19 including, if you're resting on an omission as a theory,
20 some duty to disclose, I think. But this is something that
21 you can all vet out when we look at an amended complaint.

22 The defendants correctly point out that the
23 plaintiff has not alleged with particularity any means by
24 which the defendants fraudulently concealed their alleged
25 violations. The complaint does include vague, conclusory

1 allegations of fraudulent concealment, and some of those
2 allegations are found, for example, in paragraphs 78 and 79,
3 where the plaintiff alleges, respectively, that the
4 defendants fraudulently concealed these violations so as to
5 obscure their illegal activity, and that is a quote from
6 paragraph 78, and that the defendants, quote, secretly
7 employed deceptive practices and techniques to avoid
8 detection and to fraudulently conceal their illegal acts. I
9 have pulled some of that apart, but those are all words from
10 a quote in paragraph 79.

11 These allegations lack the kind of specific
12 factual content that is required. They are not
13 particularized allegations concerning the time, place and
14 manner of the concealment or the affirmative acts of
15 concealment. They are conclusory and vague in nature. And
16 because the plaintiff has failed in my judgment to
17 adequately plead the first prong of the fraudulent
18 concealment or equitable tolling, the plaintiff's equitable
19 tolling argument fails, at least on the pleading, and the
20 plaintiff's antitrust claims are for that reason untimely.

21 Notwithstanding that that is the end of the
22 antitrust claims in the complaint, at least initially, I
23 believe it would be a disservice to both of you if I didn't
24 read some of the additional arguments advanced by the
25 defendants so that the plaintiff at least has fair notice of

1 claims, causes of action asserted by the plaintiff, and it
2 is unclear to me, at least from the complaint, whether the
3 plaintiff intends to assert independent fraud claims or
4 whether those claims are included merely in support of her
5 equitable tolling argument. I can't tell. But the
6 complaint lists, at least in the captions, fraudulent
7 concealment and fraudulent inducement as separate causes of
8 action, and for that reason let me just briefly analyze them
9 independent from the antitrust claims, to the extent that we
10 see them again and they have the same caption.

11 Under Rule 9(b) a party alleging fraud must state
12 with particularity the circumstances constituting fraud or
13 mistake. In the Tenth Circuit a plaintiff asserting a fraud
14 claim must at a minimum, quote, set forth the who, what,
15 when, where and how of the alleged fraud, end quote, and
16 describe, quote, the time, place and contents of the false
17 representation, the identity of the party making the false
18 statements and the consequences thereof, end quote. Those
19 are both quotes from the Tenth Circuit in the U.S. ex rel
20 Sikkenga case from 2006.

21 I am further informed that to prevail on a claim
22 of fraudulent concealment in the State of Utah, a plaintiff
23 must establish, number one, that the non-disclosed
24 information was material, number two, that the non-disclosed
25 information is known to the party failing to disclose and,

1 number three, that there was a legal duty to communicate
2 that information. This is drawn from the Woodside Homes
3 decision from the Utah Supreme Court in 2006.

4 For fraudulent inducement in the State of Utah, a
5 plaintiff is required to show, number one, that a
6 representation was made; number two, that representation
7 concerned a presently existing material; number three, that
8 the fact was false and; number four, that the representer
9 either knew the representation to be false or made the
10 representation recklessly, knowing that there was
11 insufficient knowledge upon which to base such a
12 representation, but there is more.

13 The plaintiff must show that the representation
14 was made for the purpose of inducing the other party to act
15 on it. Number six, that the other party was acting
16 reasonably and in ignorance of its falsity; number seven,
17 did, in fact, rely on it; and, number eight, was thereby
18 induced to act; and, number nine, that that action resulted
19 in injury and damage to the party. I am paraphrasing some
20 of that, but that is from the Keith versus Mountain Resorts
21 Development case from the Utah Supreme Court in 2014.

22 This complaint fails to state claims for
23 fraudulent concealment and fraudulent inducement. Broadly
24 speaking, the complaint lacks any particularized allegations
25 of fraud.

1 As to fraudulent concealment, the plaintiff has
2 not pled any facts to support this claim at all. In fact,
3 the complaint alleges only that, quote, the defendants and
4 their coconspirators fraudulently concealed these violations
5 so as to obscure their illegal activity by secretly
6 employing deceptive practices and techniques. That is
7 language alternatively drawn from paragraphs 78 and 79.
8 That is insufficient, facially insufficient. It is probably
9 insufficient under Rule 8, but it is for sure insufficient
10 under Rule 9.

11 Similarly, the plaintiff has not pled fraudulent
12 inducement. The complaint states only that, quote, Johnson
13 was fraudulently induced to enter into the contract that
14 USANA later changed without consideration and this is from
15 paragraph 90.

16 In her opposition to the motion to dismiss, the
17 plaintiff states that she was, quote, induced by the promise
18 of lifetime commissions as well as other benefits, and
19 detrimentally relied on that representation in marketing for
20 USANA for 14 years. This is at page 11 of that opposition,
21 docket 14.

22 I will say that although the complaint does allege
23 at paragraph 68 that the plaintiff's contract with USANA
24 included a provision for lifetime commissions, that
25 allegation is insufficient. The complaint lacks

1 particularized allegations regarding whether the promise of
2 lifetime commissions was false or whether it was made
3 recklessly, whether it was made for the purpose of inducing
4 the plaintiff to act, or whether the plaintiff reasonably
5 relied on it in entering into the contract, if you could
6 even maintain such a theory in Utah, which is unclear to me
7 given the Economic Loss Rule, and the fact that the parties
8 in fact did enter into what the plaintiff alleges was a
9 valid and enforceable contract.

10 While the Court assumes the truth of the well pled
11 allegations at the Rule 12(b) stage, it does not assume the
12 truth of vague or conclusory allegations or legal
13 conclusions as we have discussed. These allegations of
14 fraud, if they are in fact allegations of fraud, fall far
15 short of Rule 9's particularity requirement and both fraud
16 claims are for that reason dismissed.

17 Since I'm ruling against the defendants on the
18 breach of contract claim, I think I owe an explanation of
19 the basis for that ruling as well, so let me provide that
20 now.

21 Under Utah law the elements of a claim for breach
22 of contract are, number one, the existence of a contract;
23 number two, performance by the party seeking recovery;
24 number three, breach of the contract by the other party;
25 and, number four, damages. These are the elements set forth